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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of the State of Texas

Ex parte Jordan Bartlett Jones,
Respondent-Appellant

On Appeal from the Twelfth Court of Appeals, Cause No. 12-17-00346-CR, Reversing Cause No. 67295 from the County Court at Law Number Two of Smith County, Texas

LETTER OF *AMICUS CURIAE* AMERICAN BOOKSELLERS ASSOCIATION, ASSOCIATION OF ALTERNATIVE NEWSMEDIA, ASSOCIATION OF AMERICAN PUBLISHERS, INC., FREEDOM TO READ FOUNDATION, MEDIA COALITION FOUNDATION, INC. AND NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION ON ADDITIONAL AUTHORITY

To the Court of Criminal Appeals.

The Illinois Supreme Court's opinion in *People v. Austin*, 2019 IL 123910 (Ill. Sup. Ct., Oct. 18, 2019), which has been submitted to this Court as additional authority in this matter, misreads and rewrites the relevant, controlling First Amendment precedents of the United States Supreme Court. Discussed below are the most troubling departures from well-established precedents.

1. The *Austin* Court acknowledges that the Illinois statute "targets the dissemination of a specific category of speech" (p. 12) - nude or sexual images - thus finding that it is facially content-based. Nevertheless, *Austin* declares the statute content neutral, and thus subject to intermediate, rather than strict, scrutiny, because of its intent to protect privacy. (p 14) This mode of analysis is barred by *Reed v. Town of Gilbert*, which states "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech . . . ." 135 S.Ct. 2218, 2228 (2015). Therefore, as a content-based restriction the Illinois statute should have been subject to strict scrutiny.

2. *Austin* wrongfully creates a new exception from the First Amendment for statutes protecting privacy (p. 14) or regulating purely private matters. (pp. 15-17). This is directly contrary to controlling precedent of the United States Supreme Court. In *Connick v. Myers*, the United States Supreme Court held: "We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction." 461 U.S. 138, 147 (1983).

The opinion in *Austin* cites *Snyder v. Phelps* and *Dun and Bradstreet, Inc. v. Greenmoss Builders* as supporting its new rule providing less protection for private speech. However, such support is inapposite. In both cases the Supreme Court was considering speech in categories that it had already deemed to be unprotected or less protected by the First Amendment. *Dun and Bradstreet* is a defamation case, and in *Snyder*, the plaintiff sued for intentional infliction of

emotional distress. In both cases, the Court used the private v. public distinction not to deprive speech of First Amendment protection but rather to provide protection for speech that was otherwise unprotected. It should also be noted that both cases were tort claims subject only to money damages. The law at issue in this case and in *Austin* provides for criminal penalties, including incarceration.

3. Finally, *Austin* seeks to avoid having to apply strict scrutiny by suggesting that the Illinois statute at issue is a time, place and manner regulation, relying on *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Ward v. Rock Against Racism*, 491 U.S. 781 (1999) (pp. 13-15) However, neither *Renton* nor *Ward* supports that conclusion. The zoning regulation upheld in *Renton* did not ban sexually explicit communications; it relocated those communications, through zoning, based on documented undesirable secondary effects. The Illinois statute at issue in *Austin* bans the communications; it does not merely regulate the time, place, or manner of the communications. *Ward* upheld the noise restrictions because they were "justified without reference to the content of the regulated speech" and left "open ample alternative channels for communication of the information. 491 U.S. at 790. Neither of those factors is true in *Austin*. Further, as the U.S. Supreme Court said in *Reed*, "The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city." *Reed* at 2228.

Thus the Illinois Supreme Court's decision in *Austin* has no probative value to this Court in this case.

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CERTIFICATE OF SERVICE

Pursuant to Rule 11, TEX. R. APP. PROC., I hereby certify that on October 29, 2019, a true and correct copy of the foregoing Supplemental Brief of Amici Curiae Media Coalition Foundation, Inc. et al., has been served by email and by First Class United States Mail, postage prepaid, to counsel for all parties:

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